

DATA PROTECTION ACT 1998**SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER****MONETARY PENALTY NOTICE**

To: Seafish Importers Limited

Of: Unit 9 Main Road, Narborough, King's Lynn, Norfolk PE32 1TE

1. The Information Commissioner ("Commissioner") has decided to issue Seafish Importers Limited ("SI Ltd") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to a serious contravention of Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. SI Ltd, whose registered office is given above (Companies House Registration Number: 07586760) is the organisation stated in this notice to have transmitted unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
4. Regulation 22 of PECR states:

"(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.

(2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.

(3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—

- (a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;
- (b) the direct marketing is in respect of that person's similar products and services only; and
- (c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.

(4) A subscriber shall not permit his line to be used in contravention of paragraph (2)."

5. Section 122(5) of the DPA 2018 defines direct marketing as “the communication (by whatever means) of advertising material which is directed to particular individuals”. This definition also applies for the purposes of PECR).
6. Consent is defined in Article 4(11) the General Data Protection Regulation 2016/679 as “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her”.
7. The term “soft opt-in” is used to describe the rule set out in Regulation 22(3) of PECR. In essence, an organisation may be able to contact its existing customers by electronic mail even if they haven’t specifically consented to electronic mail. The soft opt-in rule can only be relied upon by the organisation that collected the contact details.
8. “Individual” is defined in regulation 2(1) of PECR as “a living individual and includes an unincorporated body of such individuals”.
9. A “subscriber” is defined in regulation 2(1) of PECR as “a person who is a party to a contract with a provider of public electronic communications services for the supply of such services”.
10. “Electronic mail” is defined in regulation 2(1) of PECR as “any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the recipient’s terminal equipment until it is collected by the recipient and includes messages sent using a short message service”.
11. Section 55A of the DPA (as amended by the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2011 and the

Privacy and Electronic Communications (Amendment) Regulations 2015) states:

"(1) The Commissioner may serve a person with a monetary penalty if the Commissioner is satisfied that –

- (a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person,
- (b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person –

- (a) knew or ought to have known that there was a risk that the contravention would occur, but
- (b) failed to take reasonable steps to prevent the contravention."

12. The Commissioner has issued statutory guidance under section 55C (1) of the DPA about the issuing of monetary penalties that has been published on the ICO's website. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.

13. PECR implements European legislation (Directive 2002/58/EC) aimed at the protection of the individual's fundamental right to privacy in the electronic communications sector. PECR was amended for the purpose of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches PECR so as to give effect to the Directives.

14. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of Part 9, Schedule 20 of that Act).

Background to the case

15. SI Ltd, trading as 'Fun Stickers', is understood by the Commissioner to design and manufacture a range of generic and licenced stickers and operate an e-commerce site under the name of Stickerexpress.co.uk.
16. The Commissioner, via the ICO SPAM reporting facility, identified a complaint regarding unsolicited direct marketing having been sent on 4 May 2020. The complainant stated:

"I am receiving spam messages up to 7x per day from this company, advertising face masks. This is a company [which] normally sells adhesive stickers, not face masks. The emails link to two websites (www.fun-stickers.com and www.stickerexpress.co.uk). The 'subscription' to this site was created from a single ebay purchase I made on 5th December 2019. The seller is using contact info from ebay sales to register customers to a mailing list and is using that mailing list to send spam. As this was an ebay transaction, I could not have consented to being added to an email sender list outside of ebay. The unsubscribe links on their websites and in the mail footer do not work. I have not been able to unsubscribe my email address despite multiple attempts over 3 months. The ebay seller is called 'fun_stickers_limited' which matches the name of one of the websites. The ebay shop is called 'stickerexpress' which matches the name of one of the websites. The company name, business address, VAT reg and company reg match those in the receipt for the original ebay transaction. [...]"

17. The Commissioner is aware that there is a registered company known as Fun Stickers Limited, of which the sole director of SI Ltd is also sole director.
18. The Commissioner, in the course of her investigations conducted a check on the 'Fun Stickers' website (www.fun-stickers.com), noting in particular that website's privacy policy. This privacy policy did not, at the time, make any reference to SI Ltd. It is noted that as of 14 October 2020, the privacy policy is now headed with 'Seafish Importers Ltd T/A Fun Stickers'.
19. Checks were also carried out on www.stickerexpress.co.uk. The Privacy Policy for this site did have a header of 'Seafish Importers Ltd T/A Fun Stickers'. The website's terms and conditions made reference to '*Seafish Imports Ltd T\A Stickers Express*' [sic], with a term that "*The Seller [defined as 'Seafish Imports Ltd T\A Stickers Express.'] may share a Buyer's [defined as the 'account applicant or person who accepts a quotation off the Seller or whose order for the Goods is accepted by the seller] information with other companies in the group and other third parties. The Buyer may be contacted or sent information in respect of further goods and services available and should inform the Seller in writing in the event that the Buyer does not wish this to receive this.*".
20. The Commissioner made contact by telephone on 16 April 2020 and spoke to the sole Director of SI Ltd and Fun Stickers Limited to advise of the ongoing investigation. An initial investigation letter was sent that day to the Director, at the Fun Stickers Limited registered office address. Amongst the questions asked in this letter was an explanation of the relationship between Fun Stickers Limited, Stickers Express and SI Ltd.

21. The Director's response of 8 June 2020 provided a spreadsheet detailing the number of messages sent by the organisation, with the associated 'list' of the location from which the data of the recipients had been obtained. The source of its data used for its campaign was stated to be "Sales by website stickerexpress.co.uk, Amazon & eBay".
22. Additionally, the Director stated "we have just registered with the ICO and the Certificate is ZA760496". The Commissioner notes that ZA760496 is the registration number for SI Ltd, which suggested that the responses being provided by the Director were sent in his capacity as director of SI Ltd.
23. Regarding the relationship between the entities, it was stated that "Fun Stickers is a trading name of Seafish Importers Ltd, stickerexpress.co.uk is the ecommerce site for above."
24. The Commissioner, on 17 June 2020, wrote to the Director seeking further clarification regarding, amongst other things, the volumes of received messages, and evidence of consent.
25. On the issue of consent, it was stated that "Regarding Sticker Express, eBay and Amazon, I assumed that Mail Chimp sorted this out until this complaint". No evidence of specific consent was provided for SI Ltd's unsolicited direct marketing. An updated spreadsheet was provided with message volumes, detailing a breakdown of those messages which had been opened, had bounced, etc. This spreadsheet listed three lists/databases from which data was used, only one of which is understood to have contained personal data: the 'Sticker Express' list. The Commissioner has been told that the 'Sticker Express' list comprises individuals whose data was obtained via eBay, Amazon, and stickerexpress.co.uk, however no breakdown of how the list is separated has been provided.

26. This updated spreadsheet showed that between 23 August 2019 and 7 April 2020 there were a total of 496,539 direct marketing messages sent to individuals whose data was held within the 'Sticker Express' list database, with 491,995 of those messages being received.
27. Of those 491,995 received messages, 276,866 were sent between 20 March 2020 and 7 April 2020 and specifically concerned the advertising of protective face masks.
28. The Commissioner has made the above findings of fact on the balance of probabilities.
29. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by SI Ltd and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

30. The Commissioner finds that SI Ltd contravened regulation 22 of PECR.
31. The Commissioner finds that the contravention was as follows:
32. The Commissioner finds that between 23 August 2019 and 7 April 2020 there were 491,995 direct marketing emails received by subscribers. The Commissioner finds that SI Ltd is responsible for the sending of the direct marketing messages, contrary to regulation 22 of PECR. Of those messages, 276,866 were sent between 20 March 2020 and 7 April 2020, during the height of the Covid-19 pandemic.
33. SI Ltd, as the sender of the direct marketing, is required to ensure that it is acting in compliance with the requirements of regulation 22 of

PECR, and to ensure that valid consent to send those messages had been acquired.

34. In this instance SI Ltd has made no effort to demonstrate that it held valid consent to engage in unsolicited direct marketing.
35. Consent is required to be “freely given”, and to not be mandated as a term or condition of service.
36. Consent must also be “specific” as to the type of marketing communication to be received, and the organisation, or specific type of organisation, that will be sending it.
37. Consent will not be “informed” if individuals do not understand what they are consenting to. Organisations should therefore always ensure that the language used is clear, easy to understand, and not hidden away in a privacy policy or small print. Consent will not be valid if individuals are asked to agree to receive marketing from “similar organisations”, “partners”, “selected third parties” or other similar generic description.
38. SI Ltd has provided no evidence that it held valid consent for the purposes of its unsolicited direct marketing campaign, or that it could avail itself to the “soft opt-in” exemption of regulation 22(3) PECR. Rather, it has stated during the investigation just that it was naïve about PECR.
39. The Commissioner is therefore satisfied from the evidence she has seen that SI Ltd did not have the necessary valid consent for the 491,995 direct marketing messages received by subscribers.

40. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

41. The Commissioner is satisfied that the contravention identified above was serious. This is because between 23 August 2019 and 7 April 2020, a confirmed total of 491,995 direct marketing messages were sent by SI Ltd and received by subscribers. Of those messages, 276,866 were sent between 20 March 2020 and 7 April 2020, during the height of the Covid-19 pandemic, relating to the sale of face masks. These messages contained direct marketing material for which subscribers had not provided valid consent.
42. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

43. The Commissioner has considered whether the contravention identified above was deliberate.
44. The Commissioner does not consider that SI Ltd deliberately set out to contravene PECR in this instance.
45. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:

46. Firstly, she has considered whether SI Ltd knew or ought reasonably to have known that there was a risk that these contraventions would occur. She is satisfied that this condition is met.
47. The Commissioner has published detailed guidance for those carrying out direct marketing explaining their legal obligations under PECR. This guidance gives clear advice regarding the requirements of consent for direct marketing and explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by email, by post, or by fax. In particular it states that organisations can generally only send, or instigate, marketing emails to individuals if that person has specifically consented to receiving them.
48. It is therefore reasonable to suppose that SI Ltd should have been aware of its responsibilities in this area.
49. Secondly, the Commissioner has gone on to consider whether SI Ltd failed to take reasonable steps to prevent the contraventions. Again, she is satisfied that this condition is met.
50. Such reasonable steps in these circumstances could have included putting in place appropriate systems and procedures to ensure that it had the specific consent of those to whom it had sent marketing emails; and adequately recording the source of the data used and evidence of any consent obtained.
51. Instead, SI Ltd has failed to provide any evidence of consent for the direct marketing messages sent to subscribers, indeed its explanation for failing to provide such evidence appears to be naivety.
52. This is particularly the case for the 276,866 messages that it sent between 20 March 2020 and 7 April 2020 advertising face masks for which recipients, whose data had been obtained by a sticker

manufacturer, cannot have had any expectation they would receive unsolicited direct marketing.

53. In the circumstances, the Commissioner is satisfied that SI Ltd failed to take reasonable steps to prevent the contraventions.
54. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

55. The Commissioner has also taken into account the following **aggravating feature** of this case:
 - For a period, the unsolicited direct marketing appeared to relate wholly to the sale of personal protective equipment (face masks), in an apparent effort to capitalise on the ongoing health pandemic.
56. The Commissioner has also taken into account the following **mitigating feature** of this case:
 - SI Ltd is understood to have ceased its marketing campaigns following the Commissioner's investigation.
57. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. She is also satisfied that the procedural rights under section 55B have been complied with.
58. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final

view, the Commissioner has taken into account the representations made by SI Ltd on this matter.

59. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
60. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
61. The Commissioner has considered the likely impact of a monetary penalty on SI Ltd. She has decided on the information that is available to her, that SI Ltd has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
62. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited marketing emails is a matter of significant public concern. A monetary penalty in this case should act as a general encouragement towards compliance with the law, or at least as a deterrent against non-compliance, on the part of all persons running businesses currently engaging in these practices. The issuing of a monetary penalty will reinforce the need for businesses to ensure that they are only messaging those who specifically consent to receive marketing.
63. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

64. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£10,000 (ten thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

65. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **2 March 2021** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.

66. If the Commissioner receives full payment of the monetary penalty by **1 March 2021** the Commissioner will reduce the monetary penalty by 20% to **£8,000 (eight thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

67. There is a right of appeal to the First-tier Tribunal (Information Rights) against:

- (a) the imposition of the monetary penalty
and/or;
- (b) the amount of the penalty specified in the monetary penalty notice.

68. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.

69. Information about appeals is set out in Annex 1.

70. The Commissioner will not take action to enforce a monetary penalty unless:

- the period specified within the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;
- all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and
- the period for appealing against the monetary penalty and any variation of it has expired.

71. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Dated the 28th day of January 2021

Andy Curry
Head of Investigations
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SK9 5AF

ANNEX 1**SECTION 55 A-E OF THE DATA PROTECTION ACT 1998****RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER**

1. Section 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the 'Tribunal') against the notice.

2. If you decide to appeal and if the Tribunal considers:-

- a) that the notice against which the appeal is brought is not in accordance with the law; or
- b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester

LE1 8DJ

Telephone: 0300 123 4504

Email: grc@justice.gov.uk

- a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.
- b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.

4. The notice of appeal should state:-

- a) your name and address/name and address of your representative (if any);
- b) an address where documents may be sent or delivered to you;
- c) the name and address of the Information Commissioner;
- d) details of the decision to which the proceedings relate;
- e) the result that you are seeking;
- f) the grounds on which you rely;
- g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;

h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.

5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.

6. The statutory provisions concerning appeals to the First-tier Tribunal (Information Rights) are contained in section 55B(5) of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).